BLANK

PAGE

IN THE

Supreme Court of the United States

October Term, 1966

No. 62

SAMUEL SPEVACK,

Petitioner,

against

SOLOMON A. KLEIN,

Respondent.

BRIEF OF NEW YORK CITY CHAPTER OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE

RALPH SHAPIRO,
Counsel for New York City Chapter of National Lawyers Guild as Amicus Curiae,
9 East 40th Street,
New York, New York.

JONATHAN W. LUBELL AND DAVID G. LUBELL,
165 Broadway,
New York, New York,
of Counsel.

BLANK

PAGE

TABLE OF CONTENTS

Table of Cases Cited

PAGE

Statutes Cited

Other Authorities Cited

IN THE

Supreme Court of the United States

October Term, 1966

No. ———

SAMUEL SPEVACK,

Petitioner,

against

SOLOMON A. KLEIN,

Respondent.

BRIEF OF NEW YORK CITY CHAPTER OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE

The Interest of the *Amicus Curiae*

The National Lawyers Guild is a national bar association, deeply interested in the rules and standards governing the practice of law in the United States and in the preservation of the freedoms guaranteed by the Bill of Rights. The manner in which the rules governing the practice of law in the State of New York affects the constitutional rights of New York attorneys is of particular concern to the New York City Chapter of the National Lawyers Guild. *Amicus Curiae* submits this brief with the consent of both parties.

Amicus Curiae believes the decision appealed from presents far reaching issues concerning the Fifth Amendment to the Constitution as made applicable to the States by the Fourteenth Amendment. The Guild believes not only that the decision appealed from limits the protection of the privilege against self-incrimination in a way never

intended by the framers of the Constitution, but also that it threatens the freedom and independence of the bar at a time in our nation's history when the legal profession, long-honored, is assuming a role of still greater social importance.

ARGUMENT

POINT I

The disbarment of petitioner for exercising his privilege against self-incrimination violates the Fifth Amendment to the Constitution made applicable to the states by the Fourteenth Amendment.

The controlling facts herein may be briefly stated. Petitioner appeals from a judgment of the New York Court of Appeals affirming an order of the Appellate Division, Second Department, disbarring him and striking his name from the role of attorneys and counselors at law in the State of New York. The sole basis for petitioner's disbarment was his refusal to testify and produce records before a judicial inquiry into his alleged professional misconduct. Petitioner asserted his constitutional privilege against compulsory self-incrimination under the Fifth and Fourteenth Amendments as the justification for his refusal.

The Fifth Amendment's privilege against compulsory self-incrimination is protected by the Fourteenth Amendment as against abridgment by the States. *Malloy* v. *Hogan*, 378 U. S. 1 (1964). The standard for determining what action by the State amounts to compulsion was stated only last year in *Griffin* v. *California*, 380 U. S. 609 (1965). Petitioner had been convicted after a trial during which the court had commented on his failure to testify. In reversing on the ground that petitioner's Fifth Amendment privilege as applied to the States by the Fourteenth Amendment was

thereby violated, the Supreme Court said of the practice of commenting on an accused's failure to testify: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U. S. 609, 614. If comment by a trial court meets the "costliness" test of *Griffin* v. *California*, then, clearly, the disbarment of petitioner in the instant case, depriving him of his profession and livelihood, meets the "costliness" test. As Mr. Justice Douglas has said, "taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction, perhaps more so." *Cohen* v. *Hurley*, 366 U. S. 117, 153-54 (1961) (dissenting opinion).* See also Mr. Justice Black's dissent in *Cohen* v. *Hurley*, 366 U. S. 117, 147-48.

Respondent's argument that the ground of petitioner's disbarment was not his exercise of his constitutional right but rather his alleged failure to cooperate with a judicial inquiry relies upon a synthetic appearance rather than the substance of reality. To recognize a constitutional right in theory while in fact withholding the benefits the Founding Fathers intended it to secure is the very thing the Supreme Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), said the States may not do. The Court in *Mapp* said, "to hold otherwise

---

* In *Cohen* v. *Hurley*, *supra*, the majority of the Court did not consider the protection afforded by the Fifth Amendment privilege against self-incrimination in the present type of proceeding because of the then prevailing rule that the federal constitutional privilege was not available in a State proceeding. The subsequent decision of this Court in *Malloy* v. *Hogan*, *supra*, which overturned the rule barring the application of the federal privilege in a State proceeding, results in the Court being squarely presented in the instant case with the grave constitutional issues arising from the disbarment of an attorney because of his use of the federal constitutional privilege in a State disciplinary proceeding.

is to grant the right *but in reality to withhold its privilege and enjoyment.*" 367 U. S. 643, 656 (emphasis added).*

The Fifth Amendment was intended as a shield to protect the citizen from the inquisitorial practice of compulsory self-incrimination. The court below considered petitioner's wielding of this constitutional shield to be a refusal to cooperate with a judicial inquiry. The wielding of any shield may be characterized as a failure to cooperate with the one attempting to reach him whom the shield protects. However, this "failure to cooperate" can in no way justify an impairment of the protection afforded by the constitutional privilege against self-incrimination. As stated by Mr. Justice Frankfurter:

> "The Founders of the Nation were not naive or disregardful of the interests of justice. The difference between them and those who deem the privilege an obstruction to due inquiry has been appropriately indicated by Chief Judge Magruder:
>
> 'Our forefathers, when they wrote this provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has

---

* While the Court in *Mapp* was speaking of the right guaranteed by the Fourth Amendment to be free from unlawful searches and seizures, in the paragraph immediately following the cited one the Court noted the close relationship of the Fourth and Fifth Amendments:

> "We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured] . . . only after years of struggle,' *Bram* v. *United States*, 168 U. S. 532, 543-544 (1897). They express 'supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.' *Feldman* v. *United States*, 322 U. S. 487, 489-490 (1944)." *Mapp* v. *Ohio*, 367 U. S. 643, 656-57 (1961) (footnote omitted).

> been largely forgotten to-day. . . . They made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused. The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application. . . .'" *Ullmann* v. *United States*, 350 U. S. 422, 427 (1956).

The privilege against self-incrimination is, in the words of Dean Erwin N. Griswold of the Harvard Law School, "one of the great landmarks in man's struggle to make himself civilized." Griswold, The Fifth Amendment Today 7 (1955), and its protection should not be limited by a narrow application, as the court below has done. Rather, the full force of the Fifth Amendment should be recognized so that it provides the protection against governmental incursions into areas of individual privacy that the Founding Fathers intended it to have. Mr. Justice Frankfurter's effort ". . . to define explicitly the spirit in which the Fifth Amendment's privilege against self-incrimination should be approached," resulted in the conclusion that "this constitutional protection must not be interpreted in a hostile or niggardly spirit." *Ullmann* v. *United States*, 350 U. S. 422, 426 (1956).

What the Supreme Court said in *Mapp* in applying the exclusionary rule regarding the use in State proceedings of evidence seized in violation of the Fourth Amendment is applicable to restrictive interpretations of the Fifth Amendment as well:

> "Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual

charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a 'freedom' implicit in the concept of ordered liberty.'" 367 U. S. 643, 655.

In *Mapp* this Court rejected an approach to a sacred right which the Court found had reduced that right to a valueless form of words. Similarly, herein, to preserve the value of the Fifth Amendment, the Court is respectfully urged to reject an approach which would recognize the privilege against self-incrimination in a wholly formalistic manner while withholding its substantive protection.

POINT II

Respondent's constitutional privilege against self-incrimination is not limited because of his status as a member of the bar.

The Fifth Amendment's privilege against self-incrimination is guaranteed equally to all persons, and petitioner is not afforded less protection because he is a member of the bar. Mr. Justice Brennan noted this point in his dissent in *Cohen* v. *Hurley*, 366 U. S. 117 (1961), a pre-*Malloy* case, which, as does the case at bar, involved the disbarment of an attorney for invoking his constitutional privilege against self-incrimination. Mr. Justice Brennan wrote: "I would hold that the full sweep of the Fifth Amendment privilege has been absorbed in the Fourteenth Amendment. In that view the protection it affords the individual, *lawyer or not*, against the State, has the same scope as that against the National Government. . . ." 366 U. S. 117, 160 (emphasis added).*

* Mr. Justice Brennan is the author of the subsequent decision of this Court in *Malloy* v. *Hogan*, 378 U. S. 1 (1964).

Respondent cites the State's need to supervise the professional conduct of attorneys as an interest which respondent would treat as superior to petitioner's constitutional right not to be compelled to incriminate himself. Although the State's need to regulate the practices of its bar cannot be gainsaid, the real issue is whether the State may perform its supervisory function in such a manner as to vitiate the system of justice and protection of individual rights as enunciated by the Founding Fathers in the Bill of Rights. As Mr. Justice Frankfurter wrote for the Court in *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961), ". . . ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." In *Sheiner* v. *State*, 82 So. 2d 657 (1955), which like the instant case, involved the disbarment of an attorney who had used his Fifth Amendment privilege, Justice Floyd of the Florida Supreme Court stated in a concurring opinion:

> "The State has charged or alleged certain conduct of appellant to be inimical to the best interests of the profession and his country. Witnesses are apparently available to sustain these allegations. If not, investigative weapons are certainly available to the State Attorney by which a 'case' may be made. . . . If the appellant has manifested a want of fidelity to the system of lawful government which he has sworn to uphold and preserve, let it be shown by a 'preponderance of the evidence' in what has come to be known . . . as the American way. . . ." 82 So. 2d 657, 666.

Similarly Mr. Justice Black dissenting in *Cohen* v. *Hurley* found that in disbarment proceedings the accused is entitled to the same constitutional rights and procedural safeguards as are enjoyed by lay persons:

> ". . . [P]etitioner is entitled to every presumption of innocence until and unless such a violation

has been charged and proved in a proceeding in which he, like other citizens, is accorded the protection of all the safeguards guaranteed by the requirements of equal protection and due process of law. This belief that lawyers too are entitled to due process and equal protection of the laws will not, I hope, be regarded as too new or too novel." 366 U. S. 117, 149.

Most recently in *Miranda* v. *Arizona*, — U. S. —, 86 Sup. Ct. 1602 (1966), the Supreme Court resisted an attempt to limit the Fifth Amendment's protection where the State has a countervailing interest. Responding to the "recurrent argument" that "society's need for interrogation outweighs the privilege [against self-incrimination]," — U. S. —, 86 Sup. Ct. 1602, 1630, the Court firmly stated its position that ". . . the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged." — U. S. —, 86 Sup. Ct. 1602, 1630.

But respondent contends that, because the practice of law is in some sense a "privilege," one who wishes to enjoy that privilege by maintaining his membership in the bar must be prepared to sacrifice some of the freedoms and protections guaranteed to all persons by the Bill of Rights, freedoms and protections won only after a centuries-long process of civilizing society. It is ironic that a committee of the Bar seeks herein to deprive an attorney of a basic constitutional right which the bar, in its dedication to our system of justice, must not only recognize but honor and zealously protect.

The courts and bar associations are duly concerned with preventing unethical practices by members of the bar. However, the superintending of the professional behavior of lawyers cannot be done in a manner such that the Bill of

Rights is denied its full and proper scope. This is especially important in regard to the Fifth Amendment's privilege against self-incrimination, the invocation of which is still regarded by a large element of the public as a badge of dishonor. See Mr. Justice Douglas dissenting in *Cohen* v. *Hurley*, 366 U. S. 117, 152 (1961). The courts have an important educative role to fulfill in this area. In the words of Mr. Justice Brandeis' clairvoyant dissent in *Olmstead*, "our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928). Yet the example of government in the instant case, limiting the efficacy of the privilege against self-incrimination by asserting that the ground for petitioner's disbarment is non-cooperation with a judicial inquiry, is not calculated to give the public an understanding of the Fifth Amendment as a protection to which there is a right of recourse not only for the guilty but also for the innocent. On the contrary the very opposite misapprehension of the privilege is fostered by respondent's actions. Mr. Justice Frankfurter's description of the general attitude in our society toward the privilege against self-incrimination is pertinent herein:

> "This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, *even those who should be better advised*, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." *Ullmann* v. *United States*, 350 U. S. 422, 426-27 (1956) (footnote omitted; emphasis added).

Rather than regarding the "privilege" to practice law as a reason for limiting the Fifth Amendment rights of lawyers, the influential role of lawyers in our society makes

it imperative that they not be trammeled in their important work by limitations on their rights. This view was forcefully expressed in his *Cohen* dissent by Mr. Justice Black, whose view in *Cohen* that the Fourteenth Amendment made the Fifth Amendment controlling on the States was subsequently adopted by the Court in *Malloy*. Mr. Justice Black wrote:

> "I heartily agree with the view expressed by the majority that lawyers occupy an important position in our society, for I recognize that they have a great deal to do with the administration, the enforcement, the interpretation, and frequently even with the making of the Constitution and the other laws that govern us. But I do not agree with the majority that the importance of their position in any way justifies a discrimination against them with regard to their basic rights as individuals. Quite the contrary, I would think that the important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence." *Cohen* v. *Hurley*, 366 U. S. 117, 138 (1961).

As sharp as these words were when Mr. Justice Black wrote them, developments subsequent to the *Cohen* case have given them an even greater poignancy. The landmark decisions of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), *National Association for the Advancement of Colored People* v. *Button*, 371 U. S. 415 (1963), and *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U. S. 1 (1964), and the commitment of the national government to eradicate poverty in our land have multiplied the already great responsi-

bilities of the legal profession. *Gideon* and its aftermath, *Douglas* v. *California*, 372 U. S. 353 (1963), *Massiah* v. *United States*, 377 U. S. 201 (1964), *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and *Miranda* v. *Arizona*, — U. S. —, 86 Sup. Ct. 1602 (1966), which made the provision of counsel for indigent defendants in all criminal cases mandatory upon the States and which made this right to counsel meaningful by holding that the right exists at the earliest part of the criminal proceedings, not only increased the need for lawyers but also put a premium on the stoutness of heart of the American bar, for championing the unpopular cause of the criminal defendant often subjects the lawyer to public disrepute. Both the ability and desire of the lawyer to render services in these new, important areas will be affected by whether he is entitled to the privilege not to be a witness against himself, or whether he is subject to disbarment proceedings if he remains silent at a judicial inquiry.

In the area of civil litigation recognition of the need of the poor for legal services is beginning to develop.* The conventional techniques of the bar in providing legal services and the traditional notion of the lawyer-client relationship may have to be altered in dealing with the very special problems of the poor, and new approaches such as neighborhood law offices and group legal services are being tried.

The present age of necessary experimentation and innovation in the effort to meet the legal profession's responsibilities as enunciated by the decisions of this Court and as recognized by national policy embodied in the anti-

---

* See for example the perceptive article by Edgar S. and Jean C. Cahn, "The War on Poverty: A Civilian Perspective," 73 Yale L. J. 1317-52 (1964). See also Cohen, "Law, Lawyers, and Poverty" in 43 Texas L. Rev. 1072-93 (1963) and Carlin and Howard, "Legal Representation and Class Justice" in 12 U. C. L. A. L. Rev. 381-437 (1965).

poverty program supplies the modern framework in which the independence nurtured by the protection of the Fifth Amendment privilege becomes even more important. The doctrine that a lawyer's Fifth Amendment rights are limited, wrote Mr. Justice Black, ". . . can go far toward destroying the independence of the legal profession and thus toward rendering that profession largely incapable of performing the very kinds of services for the public that most justify its existence." *Cohen* v. *Hurley*, 366 U. S. 117, 135 (1961) (dissenting opinion).

CONCLUSION

The judgment disbarring petitioner should be reversed.

Respectfully submitted,

RALPH SHAPIRO,
Counsel for New York City Chapter of National Lawyers Guild as Amicus Curiae.

JONATHAN W. LUBELL AND DAVID G. LUBELL,
165 Broadway,
New York, New York,
of Counsel.

BLANK

PAGE